ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, December 1, 2005

Federal Trade Commission Conference Center
601 New Jersey Avenue, Northwest
Washington, D.C.

The hearing convened, pursuant to notice, at 10:00 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
DEBRA A. VALENTINE, Commissioner

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ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director
and General Counsel
WILLIAM F. ADKINSON, JR., Counsel
TODD ANDERSON, Counsel
HIRAM ANDREWS, Law Clerk
KRISTEN M. GORZELANY, Paralegal

C O N T E N T S

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his testimony.

P R O C E E D I N G S

CHAIRPERSON GARZA: We will start the hearings this morning, Antitrust Modernization Commission hearings on Government Civil Remedies.

I would like to thank and welcome our witnesses this morning. I'll tell you a little bit about how we are going to proceed. We will give each of you about five minutes to summarize your testimony. When you are done, then we will have a lead questioner. Commissioner Burchfield will be the lead questioner this morning. We'll take about 20 minutes to ask questions and then, following that, each of the other Commissioners present will get five to 10 minutes to ask their own questions of the panelists.

We have two hours scheduled for today, but if possible, we will try to wrap up a little bit early, given that we have fewer Commissioners today than the full panel.

So with that, can I ask Commissioner Leary, if you would like to make your statement.

COMMISSIONER LEARY: Thank you very much,

Madam Chairman. It is a pleasure to be here for this distinguished group.

I will give a quick summary of what I have to say. First of all, in the beginning of my statement I took account of the paper filed by the American Bar Association roughly a month ago on differential merger enforcements standards, and I would like to say that I agree in principle with what the American Bar Association had to say.

My only difference with them is that I believe, as a practical matter, the issue is not as important as it theoretically might appear, and that, in any event, I don't believe legislation is necessary. I think, with good orderly direction, the Federal Trade Commission itself can take care of this problem.

Specifically, the ABA mentioned the fact that the Federal Trade Commission has the option in reviewing a merger to pursue administrative litigation, even though it may have lost a preliminary injunction hearing or, indeed, lost on appeal in a federal court.

You may know that for 10 years the

Commission has had a policy internally that very severely restricts that option. In fact, to my knowledge, the FTC has never brought an administrative action within the last 10 years following a loss in federal court.

I believe that the Commission ought to elect up front which way it wants to go. I don't think anything would be lost from the Commission's point of view if it eliminated that theoretical option, which we don't use in practice, anyway. If the Commission were to do that, I think it would automatically take care of the other issue that the ABA raises, which is the facially different preliminary injunction standards.

I don't know whether courts actually apply that difference in practice or not, but in any event, I agree it is an anomaly. There is no reason in the world why the Federal Trade Commission should have a different standard for a preliminary injunction than the Department of Justice in dealing with exactly the same issues, and a respondent which by the luck of the draw finds itself in one agency or another. I don't think there is any justification for it.

Again, I think that this is something that can be taken care of unilaterally, and I would appreciate your encouragement for the Commission to do it unilaterally.

The second issue is monetary recoveries under 13(b). There are a variety of views on that. My individual view--Kevin, I hate to disagree with someone who had the good taste to cite me repeatedly in his paper--

[Laughter.]

COMMISSIONER LEARY: I think really, at this point we may be tilting at windmills. I am not nearly as enthusiastic about the 13(b) remedy as either John Graubert or Steve Calkins here on my left, but as a practical matter--now that we have a restrictive policy in place--I think that the chances it will be overused are very slight. I am not suggesting that this Commission do nothing. I would appreciate your taking note of this policy, which is something that obviously doesn't bind any further administration. I would hope that you would encourage restrictive use of the 13(b) remedy by both the FTC and by the Department of Justice, which, by

the way, has the power to do the same thing under its own injunctive remedies. They have not used it.

I don't necessarily think dual antitrust jurisdiction was an issue for this morning, but I wanted to talk about it anyhow, if you are going to consider it and say something about it. I think probably you should consider it and say something about it, although I also think the chances of Congress ever doing anything about it are minimal. We've been around the block so many times on this issue. If you do say something, I prayerfully request that you consider the full range of remedies for market distortions, and the very close linkage between consumer protection and antitrust, which most people don't realize.

They are both economic concepts. The only difference is antitrust deals with supply-side distortions, and consumer protection deals with demand-side distortions. But there are a lot of similarities. They each have a *per se* type component, and they each have a Rule-of-Reason type component, which I have discussed in my paper and which is outlined in the chart here. Different kinds

of prosecutorial expertise are needed for each, but the one thing you never want to see, in my view, is a consumer protection agency that does not respect market principles and consumer sovereignty.

There is a very, very serious risk, if you were ever to spin consumer protection off by its lonesome, that you would wind up with an overly paternalistic regime that I don't think anyone wants.

I see my red light is on, and I will shut up. Thank you.

CHAIRPERSON GARZA: Well, thank you very much.

Mr. Graubert.

MR. GRAUBERT: Thank you. I begin with the usual disclaimer that my comments this morning are my own, although the Commission has authorized me to submit a written statement, which was circulated yesterday, and I apologize for the delay.

As that statement indicates, I am limiting my comments to your questions relating to the FTC's use of Section 13(b) and not addressing the question relating to civil fines.

With respect to Section 13(b) and its use to

obtain equitable monetary relief in competition cases, such relief, which is granted only by a federal district court, has long been a part of the FTC's arsenal of remedies for antitrust violations, and the agency has exercised its authority carefully, sparingly, and, in my view, successfully.

So far as I am aware, there has never been any concrete demonstration that the Commission's approach to monetary remedies in any particular case has caused any unfair prejudice or harm to anyone or to the antitrust enforcement system as a whole.

Further, in 2003, as Commissioner Leary suggested, the Commission unanimously adopted a policy statement describing for the antitrust bar and the public some of the factors that would enter into its decision whether to seek monetary remedies in competition cases.

Given this experience, I respectfully submit that there is no need for any action by Congress in this area at this time.

My written comments address three points. First, I point out that the Commission's ability to seek monetary equitable remedies is well established.

This is not an area in which we are seeking new authority or seeking to extend our authority. We have had this authority at least since the enactment of Section 13(b) in 1973, if not before, although we have shown, I would suggest, considerable restraint and have used this authority in less than a dozen cases since that time.

The courts have consistently upheld our requests for monetary equitable relief, and the Supreme Court has made clear that the response to an antitrust violation would be incomplete if the violators were not deprived of the gains from their unlawful conduct and the *status quo ante* restored to the extent possible.

The Commission's recourse to monetary equitable remedies is therefore deeply rooted in antitrust jurisprudence, and the Commission has indicated in its policy statement and from its actions that it approaches a decision to seek monetary remedies thoughtfully and very carefully.

Second, in my comments I address the claim that having the Commission seeking monetary remedies would result in multiple or duplicative recoveries,

presumably because lawsuits from private plaintiffs or other government agencies also would result in monetary recoveries.

The short answer to this assertion is that to my knowledge it has never happened in the 30 years that we have had this authority. In any event, in its policy statement the Commission said, giving this argument very, very broad benefit of the doubt, it had no intention of piling on and would take actions where appropriate to avoid any such possibility.

I am referring to the long history of SEC practice just up the street in this area. The Commission alluded to the possibilities of set-offs, credits, escrow accounts, and other procedural mechanisms.

Finally, in a related point, our policy statement makes clear that the Commission seriously considers whether monetary remedies are called for because other remedies are likely to fail to accomplish fully the purposes of the antitrust laws.

When other remedies are brought to bear and are likely to result in complete relief, the Commission action for monetary equitable relief would

be unnecessary.

There are, however, situations where reliance on other remedies is likely to be inadequate. A private action, for example, may not provide complete relief for a number of reasons. There may be statutes of limitations or standing issues, direct purchasers may not sue for a variety of possible reasons, including a desire to maintain relationships with suppliers, and indirect purchasers may be precluded from suit.

I also would just like to mention in passing that, when the Commission obtains disgorgement or restitution, all of the recovered funds, less relatively small administrative costs if a settlement administrator is retained--all of those funds are available for consumers without a deduction for private counsel's attorneys fees, and we have seen that in our most recent cases.

Those recent cases have been resolved efficiently and quickly, relatively speaking, compared to their private counterparts, and I submit that those recent cases show that transaction costs overall can be reduced when the government obtains a

quick and meaningful recovery.

So I would summarize by saying that the Commission has proceeded very carefully in this area, and as always, our goal or our task is to try to come up with an appropriate remedy that's tailored to the circumstances of a particular case as needed to provide complete and effective relief.

The Commission has provided the business community with substantial guidance on the circumstances in which the Commission may seek these remedies, and as there is no indication that there is any actual real problem in this area, I respectfully submit that there is no basis for any legislative intervention.

Thank you.

CHAIRPERSON GARZA: Thank you. Professor Calkins.

MR. CALKINS: Thank you. Thank you for the invitation to be here. My apologies for the tardiness in the submission of my overly long set of comments. But it is a pleasure to be able to address you briefly now and then in response to your questions.

I made three points in my paper, and I make them now again. The first is that the antitrust system as we know it, at least without 13(b), has what I have called a bimodal set of penalties, and that is unfortunate.

The second is that, sharing John Graubert's view, there is no reason for Congress to take action with respect to 13(b).

And the third point is that there is reason to do some serious thinking about whether there should be a way for the Justice Department to address what I would describe as the middle category of cases.

Let me go through each of those points in turn.

First, on the bimodal penalties, consider, if you will, a group of physicians who have engaged in something that they might have thought was joint negotiating in a lawful and honorable fashion but that others might consider to be price fixing. Now assume that that case is being reviewed by the Justice Department.

In the end, there is going to be a choice,

and the Division will go one of two ways. I know that many of you have more experience in the Division than I do, but I am simply describing what happens. At the end of the day, the Division may say, "This is price fixing, and it is criminal"--and the result is that we have somebody potentially convicted of a felony and paying massive fines, with jail time, and the whole nine yards.

On the other hand, the Division might say, "No, we are going to treat this civilly," at which point you go to the opposite extreme, and the result would be merely an injunction that could be characterized by some as a slap on the wrist; or the Division could bring no case at all. It is one extreme or the other. There is no middle ground.

And that, I submit, is unfortunate for a number of different reasons.

First, I fear that there may, on occasion, be a temptation to go to the whole nine yards. Honest government officials are looking at what they regard as serious behavior, and unless they go criminal, there will not be a meaningful consequence; and perhaps that creates an incentive to go criminal.

Perhaps that had something to do with why the Division did go criminal in the *Alston* case. That's just an unfortunate incentive, even if people are acting in good faith.

Second, perhaps there is an incentive, on occasion, for people drafting orders to think, "These folks have done wrong, and we need to do some punishing by writing an order that is perhaps a little tougher than it otherwise could be."

Third, you have a lack of deterrence in this kind of case. Just to point to the world of physicians: the FTC now, according to Chairman Majoras, has 20,000 physicians under order; every year there are another 10 physician price-fixing cases; and nothing ever seems to happen. Perhaps that is because there is no meaningful consequence, there are no follow-on cases, you don't have treble damages, and you get consent order after consent order after consent order without meaningful deterrence and without any compensation. That is not a good situation.

This situation is addressed in a very, very limited way by the Commission in 13(b). There is a

role for 13(b) to play. The Commission has proceeded in a very limited, cautious fashion, as John has outlined, and, for a number of reasons which I don't have time to get into, it's something that is not broken--there is no need to address it; there is no reason to go to Congress. The arguments against it are unpersuasive, but I will wait and respond to those later after we hear them.

Third, with respect to the Division, there is a serious question as to whether it wouldn't be good for the Division to have an option that is something other than the whole nine yards or the slap on the wrist. One option would be civil fines, letting the Division and the FTC join the rest of the antitrust world in having that authority. This would create a remedy that is in the middle category, that provides some deterrence for those cases--and I note that it would be superior to disgorgement for the cases where the parties have done wrong and yet have not reaped benefits that could be disgorged. It is important to have deterrence, so a fine has a certain appeal.

Deterrence of middle-category cases also

could be accomplished by the Division exploring its ability to seek equitable relief, as Commissioner Leary has suggested. The Justice Department recently took the position in a Supreme Court *cert.* reply brief that the antitrust laws already have authorized the seeking of equitable relief, so perhaps the Division should think about that.

Frankly, at the moment, I am agnostic as to which is the more attractive option. I am candidly always scared about going anywhere near Congress. But certainly there is a serious question as to whether it wouldn't be a good thing for the Antitrust Division to have some middle category of remedy that would let it act in a way comparable to what the FTC is very responsibly, carefully, and cautiously doing with 13(b).

Thank you, and I look forward to your questions.

CHAIRPERSON GARZA: Thank you. Mr. Arquit.

MR. ARQUIT: Thank you. Commissioner Leary, perhaps if I could paraphrase you, dare I say you have fallen for the very seductiveness that you warned against in an earlier day.

When I initially looked at the first question for discussion today, I asked myself--it really seemed as though the question was akin to asking whether we should be bringing ice to Eskimos. But upon further reflection and listening to the testimony today, my view hasn't changed one bit.

Let me explain that for a little bit. I don't mind at all being the Lone Ranger on this issue. I will try to get my comments in within five minutes.

But the starting point for those who advocate more remedies is that what the government has right now is toothless. It's only prospective, and so it really doesn't serve any deterrent effect.

I submit to you that is tantamount to a batter starting on second base. The fact of the matter is, the government has very broad relief available to it in the form of injunctions. Look at the injunctions that they get and which courts have said they can get. It can cover not just the behavior that was illegal; it often covers adjacent products, adjacent areas. Clearly the FTC in its orders sometimes forbids conduct that is perfectly

legal.

Just look at the vertical price-fixing cases and you will see in there provisions where parties' *Colgate* rights are taken away from them, perfectly legal conduct not allowed to be engaged in.

So the orders themselves are in fact very broad and have a deterrent effect. Go beyond that, though. The fact is, these orders have a much broader deterrent effect than merely the language that is in them, and the government action is typically a precursor to private action, and this is encouraged by our statutory scheme.

Look at just a couple of statutory sections here. Clayton Act, Section 5(a). What this does is encourage the private plaintiffs--and I think this is a response to Mr. Graubert's point about, well, the FTC can get the money in disgorgement; we'll decide how to divide it all up; don't worry about multiple recovery.

Well, look at what 5(a) suggests that you do. It tells the plaintiff to go sit in the easy chair while the government plows the heavy snow because what it does is toll the statute of

limitations for private suits until one year after the termination of the government proceeding.

And at that point in time, when the private plaintiff brings the case, it gets to recover not just for the period of time of the government proceeding but also for the four years beside that.

And you add to that, overlay onto that Section 5(a) of the Clayton Act, which says that any findings that were necessarily found in a government action are available as *prima facie* evidence to a plaintiff in that later case.

So when you look at the relief the government has, you have to look at it in its totality and where it takes you.

But in any event, the question about whether the agency should have broader power I don't think should be agency-centric, and I must admit, when I was at the agency, I had a tendency to do that. I think when people are thinking about the agencies, they think about it just in the context of what the agency needs and wants in order to spread its word.

But you have really got to look at this in the context of the entire fabric of public and

private remedies that are available. The Supreme Court has said repeatedly that over-deterrence is not good public policy. They said it in *Illinois Brick*, and they said it in *Hanover Shoe*; they said it in any number of cases.

And when you glimpse the bigger picture here, there's any number of target points that can come at an alleged wrongdoer. And you have had other sessions on this so I don't need to go into it at length, but you've got the direct purchasers under *Illinois Brick*, okay. *Illinois Brick* only applies to overcharge cases, so, in addition to those customers, you've got competitors that can bring treble-damage actions, no application of *Illinois Brick* there. That gets you up to six.

Then you've got the indirect purchasers that, in 30 or so states, can bring actions. There's no ability to set off a state in a federal claim. If a federal case is brought first and the state case is brought later, what are you going to do? Go back and disgorge the money that was given to the federal plaintiff to give to the state plaintiff? Of course not. There's the possibility of multiple recovery.

I think that, for those reasons, the case has not been made out for any additional authority to be made available to the government.

Now, that brings us to the second question, which is the availability of disgorgement under Section 13(b). I wish I had time to go into detail, but of course we don't have that luxury with five minutes. But it is very, very clear that the Congress did not intend 13(b) to apply to antitrust cases.

And again, it is, to me, incredible base-stealing that the Commission talks about the authority that it's had for 30 years when, for most of that time, they're talking about the enforcement in the consumer protection area, where there is a completely different legislative history. That's not the right history to look at. You're mixing apples and oranges to do that.

To be sure, two district courts have found that disgorgement authority springs from 13(b), and we all know what 13(b) says. It says, "Provided further that in proper cases the Commission may seek . . . a permanent injunction." That's all it says.

And the Commission goes from that to getting disgorgement restitution and the like.

I think that when you look at both of these cases, and they were both here in D.C., D.C. District Court, to say that those--the discussion in those cases was not robust is to be charitable. There is no discussion of the legislative history, there is plenty of citation to consumer protection cases. There is citation to *Porter v. Warner*, and amazingly, in the *Mylan* case Judge Hogan doesn't even mention the *KFC* case, which had been decided by that point by the Supreme Court, where they significantly scaled back *Porter v. Warner*. The court just ignored--didn't discuss it.

I think that, closer to home, and one thing that should be of very much concern to folks at the agency and to you all, is to see what the court, what the appellate court in this circuit did. The appellate court, where the two district courts had found authority, did, earlier this year in the *Philip Morris* case. There the government argued that it was entitled to disgorgement under RICO. Why was it entitled to disgorgement? Because the RICO statute

gives it the ability to seek an injunction--gives it the ability to seek an injunction; that's its argument.

What's the FTC's argument as to why it deserves the right to get disgorgement or restitution? Because it has the right to seek an injunction. And what the D.C. Circuit said was very simple reasoning. They said, "Look, yeah, you've got the right to get an injunction, so we'll look at the other equitable remedies that are inferred from that, but an injunction by definition is prospective. An injunction by definition looks forward. Disgorgement, by its very nature"--and this is the court saying this--"is quintessentially backward. It's a measure by and for the past." And so the court had no trouble finding that there was simply no disgorgement authority available to the government under a statute where the only statutory mandate is the ability to seek an injunction.

And the next time that the Commission brings an antitrust case under this disgorgement area, and if a party takes it up on appeal, I think that the *Philip Morris* case is--in fact, that statute gave

more authority than 13(b) does, that there is a very real risk that 13(b) is going to be--they're going to find out they don't have the authority.

I would like, if I--I know I'm at the end of my time. Could I just make one comment on the Commission's statement? Is that okay?

CHAIRPERSON GARZA: Sure.

MR. ARQUIT: Because I do want to respond a little bit to that.

I think that the other reason the congressional guidance is needed under 13(b) is simply this: human nature. When authority is vague, it's the natural tendency of people to push the envelope until there's pushback. 13(b) is a classic example of enforcement creep.

You go back to when it was passed in 1973. The Commission gingerly put its toe in the water. It started with settlements, then it got asset freezes, then it moved into these hard-core fraud cases where people were bilked in terms of land purchases and the like. So it slowly moves along and the Commission builds its authority based on--and they keep stretching it further and further.

Then they move it over to antitrust. When they go to antitrust, the first case that's brought is one involving *per se* price-fixing behavior, alleged *per se* price-fixing behavior.

The second one had to do with exclusive dealing. See how we're moving down the road?

And the third one had to do with mergers, Section 7, an incipiency standard. One where the Commission says, "Well, of course we brought disgorgement, because it was a merger to monopoly."

Well, people should be aware of Judge Winter and other people's decisions in the Second Circuit in *Waste Management*, that even a merger to monopoly is not illegal if there are no entry barriers.

There was no warning to parties that there was going to be disgorgement brought in that kind of case. And so what you have is that, in the early days, what we used to hear from Commission officials was that 13(b) would only be used where it was hard-core, egregious, bad faith, reckless negligence. Those are the terms of Commission officials.

Now what do we have, now that there a couple of wins under its belt? It's a statement of 2003. I

suggest that statement really doesn't give any guidance at all. What it is is a three-part statement. It says the violation has to be clear, it has to be calculable, and it has to bring value-added.

Now that's a far cry from those statements of those Commission officials of a few years ago. And where is this going to lead? There's no reason to think that we are now at a static point. Human nature. The extension will continue, and either we don't know where it ends up, or there will be an appellate case that's brought where it will be reversed. And I think congressional guidance is clearly preferable to either of those unpredictable alternatives.

Thank you.

CHAIRPERSON GARZA: All right, thank you. Commissioner Burchfield.

COMMISSIONER BURCHFIELD: Let me start with where Mr. Arquit just left off. I take it that the others on the panel believe that, under the current state of the law, and, as I understand it, Mr. Graubert, from your statement, there are two district

court decisions, seven district court settlements, and four administrative settlements that are on the side of the ledger supporting disgorgement authority under 13(b), but I take it that there are no appellate decisions in the competition area.

I know Professor Calkins cites some in the settlement area, but are there any appellate decisions supporting that authority?

MR. GRAUBERT: No, not brought by us that I am aware of.

COMMISSIONER BURCHFIELD: Does it--from your perspective and speaking--I'll ask everyone on the panel this--is Mr. Arquit correct that it would be better to go to Congress and seek clarification on this than to await the day when one of the parties--when a defendant or respondent decides to take this to the appellate court rather than settling under Section 13(b)?

MR. GRAUBERT: If I could--I would just like to note in passing that, not in an FTC case but in an FDA case, the court has already rejected the arguments that Mr. Arquit has made about *KFC* and *Philip Morris*, and I direct your attention, if you

are interested in following up on this, to the *Lane Labs* case in the Third Circuit last month.

I think there are additional arguments that can be made, but certainly the arguments that they make in that case for distinguishing *KFC* and *Philip Morris* I think are good ones. I am completely unpersuaded that *KFC* or *Philip Morris* has anything to do with our statute, and we can discuss that later, if you like.

I would also say, speaking for myself, of course--I would sort of concur with Professor Calkins' general observation that, you know, we like to go to Congress when we have a specific problem, when we have a specific need, and we are sure that our solution or our request is not going to have a lot of unintended consequences elsewhere.

I just don't think that is the case here. If the courts are going to take care of this problem, I don't know why Congress needs to be involved at all.

I shouldn't be ungracious. If you want to give us something that is helpful, I suppose I should accept. But the final sort of thing to emphasize, I

would suggest, is that this is not the FTC levying monetary punishment on people. This is remedies within the jurisdiction of a court exercising its equitable jurisdiction.

Kevin has made this argument many times and may again in front of courts. I guess when he was on the Bureau side, he won, and when he was on the private side, he lost. And that, I think, is the appropriate place where these arguments should be made. Because you are invoking a court's equitable jurisdiction to try to apply a remedy in a particular case, and it is very difficult to apply these matters sort of inflexibly across the board.

I would say that I would disagree also with Mr. Arquit that Congress did not intend 13(b) to apply to competition cases. It is quite clear that they did, at least with respect to merger injunctions. That was the primary purpose of 13(b), and that also encompasses a variety of equitable remedies, such as divestiture orders and other things.

I would agree, however--I would at least concede this, that the legislative history of the

original statute is very thin. There is not a lot of legislative history at the time for the enactment of a statute, but Congress did revisit Section 13(b), I think it was in 1993, and strengthened it. It added venue provisions and service of process provisions, so by that time, the Congress was aware of what the Commission was doing with 13(b), and showed--not only didn't show any disapproval, but showed an intent to give the Commission even more authority.

So I think Congress's intent is sufficiently clear.

COMMISSIONER BURCHFIELD: Let me ask Commissioner Leary for his views on it. Is it preferable--and from my way of looking at things, until you have one or more authoritative appellate court decisions on the issue, there is necessarily some doubt. We may disagree as to the degree of doubt, but there is some doubt on this issue. Is it preferable to await that day or to seek clarification from Congress on this issue?

COMMISSIONER LEARY: Well, in my view, Commissioner Burchfield, I think we need to wait for two things. I think we need to wait to see whether

or not there are serious problems that arise as a result of what I regard as a very restrictive self-discipline that we imposed upon ourselves in the year 2003 and that I think should be extended once the present commissioners are gone.

I think secondly, if you go to Congress, you have always got to be careful what you ask for. I think that Kevin Arquit is clearly right that when Congress passed Section 13(b), it never dreamed that it would be used the way it has been used, either for consumer protection offenses or for antitrust offenses.

However, I also have no doubt that if you were to go back to Congress and ask them collectively today whether or not they approve of the way it's being used on the consumer protection side--and hopefully with restraint on the antitrust side--the answer you would get would be a congressional endorsement of the use of 13(b).

As is obvious from the quotations, I was not enthusiastic about the extension of 13(b) to antitrust cases, but if I have learned one thing in my six years, it is that government is the art of the

possible. You can maintain the pristine purity of your position all by yourself, because, believe me, no one agreed with me--and we have had some changing of the guard since I first got on the Commission. You can maintain the pristine purity, or you can attempt to work on the inside to get the best policy possible, unanimously, and that's what I chose to do in the circumstances.

COMMISSIONER BURCHFIELD: Professor Calkins, your view on the--from a policy perspective and from our perspective of making a recommendation at the end of the day on this issue, is it better to await authoritative judicial pronouncement on this issue, or to seek clarification from Congress?

MR. CALKINS: With all due respect, Commissioner Burchfield, this exact issue of 13(b) has been addressed by a whole series of courts of appeals, and they are unanimous that the Commission has this authority. 13(b) was enacted as an antitrust provision. It was enacted during an energy crisis because of an interest in antitrust issues. It is not a consumer protection provision at all. It was written to apply to all of the Commission's

statutory authority, so all of Section 5 is included in its words, but if you go back and find out why it's there, it's there because of antitrust issues.

When you have a statute that applies equally to the consumer protection and the antitrust part of the spectrum, when the statute was passed with an antitrust motivation, when it has been unanimously upheld in its application by every court of appeals that has looked at it, with now--I'm not sure of the count, but we're up to five or six courts of appeal, or maybe it's eight courts of appeal--when in the world of competition it has been successfully used by the Commission, been used by Kevin back when he was Bureau Director, and has been used now in a series of cases over the years--even if not frequently--when it's been used in that fashion . . . .

COMMISSIONER BURCHFIELD: You cited in your paper, you said seven or eight to nine.

MR. CALKINS: I would say this is not something where the law is unsettled. That would be point one.

Point two is that, if the law is potentially at risk because of a new case that Kevin wants to

talk about, I agree that the Third Circuit has already answered the question. But my additional response is that if the Supreme Court in its wisdom wants to say that all those courts of appeal are wrong, it has every right and ample opportunity to do that. There are 13(b) cases being decided every year, so there are lots of opportunities for this issue to be addressed by courts of appeal and by the Supreme Court. If the Court wants to say that the settled law of 13(b) is wrong, well, the Supreme Court has every right to do that--and if it does it, I am confident that Congress will rush to pass a new statute to undo what the Supreme Court just did.

But given that we have settled law, and the argument is that the Supreme Court may have unsettled it, the obviously correct thing for your group to do is to say, "Congress, you should do nothing. If there is a problem, the courts will address it, and otherwise there is no need for action."

COMMISSIONER BURCHFIELD: Mr. Arquit, any further comment?

MR. ARQUIT: Yes, and I'll try to keep them brief.

First of all, I agree with Commissioner Leary in terms of his interpretation of 13(b), but I think that is a far cry from saying, "Congress would accept this proposition today," to an agency saying, "Since Congress will accept it, let's pretend it's the law." I just don't see that as good public policy.

Very briefly, because I don't want to get into a lot of technical detail, but the history of 13(b). What we hear is that it was passed as consumer protection law. Let's talk about what really happened with 13(b).

It was part of the Magnusson-Moss Warranty Act. Magnusson-Moss wasn't passed until 1975. This provision was part of Magnusson-Moss, which was a consumer protection statute. It was pulled out of Magnusson-Moss and added as a rider to the Trans-Alaska Pipeline bill, for reasons that Professor Calkins is correct--there was an energy crisis, and what happened is that the General Counsel of the Federal Trade Commission wrote a letter to Congress and said, "In antitrust cases we need to have the ability to get preliminary injunctions when it comes

to these acquisitions, because otherwise the egg is scrambled and we can't do anything about it."

In response to the letter from the Federal Trade Commission's General Counsel, the language was changed in the first part of Section 13(b) to where it says for any provision of law that the Commission enforces a preliminary injunction can be sought in contemplation of an administrative complaint.

Okay, so they made the change. That is all about antitrust. But the second part, the part that the Commission relies on to get these injunctions, never changed. It said provided in a proper case, and that proper case, when you look at the Senate report, was intended to cover routine fraud cases where the Congress did not want to require the Commission to go through long administrative proceedings when it could bring a permanent injunction action.

So that is the story of 13(b). And the blending, in terms of those who try to say it was an antitrust statute with the first half of it, where clearly, it was intended to give the Commission the ability to seek preliminary injunctions, and the

second part, where the language remained identical and where the FTC didn't ask that the language be changed, was limited to consumer protection--

As to--it's always brought up, my history at the FTC, and I suppose that's fair game, and I suppose the easy answer to that is that if memos written in government don't bind Judge Alito and Chief Justice Roberts, I suspect they shouldn't have to bind me either.

COMMISSIONER BURCHFIELD: The jury is still out on that.

[Laughter.]

MR. ARQUIT: But let me give a more substantive answer to the question, which is that the *Abbott* case was a *per se* case, and, at that time, there was the language that we were all hearing--and believe me, I think at that day no one on the Commission would have dreamed that 13(b) would be used in competition cases or that the policy statement that it was issued would be where it is.

So we have already seen movement from that, but that was before the *KFC* case, and the *KFC* case was around by the time I was in private practice, and

it was raised, and the judge didn't deal with it.

In terms of the Third Circuit case, the district court cases here that go the Commission's way are all in the District of Columbia. That's the very circuit where the Circuit Court has said exactly the opposite. So I think that's stronger precedent than is the Third Circuit.

And I think that the whole notion of going to Congress is appropriate, because let's find out what Congress has to say. And because the issue is identical in terms of--at least if you look at the *Philip Morris* case, about prospective versus retrospective, and the courts looked at *Porter v. Warner*, and they talked about the case law since then by the Supreme Court, and said they should be chary about addressing jurisdiction, I think the Commission has a real risk, notwithstanding all these courts of appeals decisions that have come before this, to have the issue knocked out. Because if it falls apart for antitrust, the argument as to that part is identical to consumer protection.

COMMISSIONER BURCHFIELD: Commissioner Leary, you in your statement make clear that even

though you originally had reservations about this, in light of the Commission's policy statement you are now supportive of the Section 13(b) remedy.

You asked the Commission for guidance. Do you envision the guidance that we would provide to be affirmation of the current policy statement, or do you have something different in mind for what this Commission should do?

COMMISSIONER LEARY: What I had in mind, Commissioner Burchfield, is the idea that your Commission should indicate this is a remedy that should be used most sparingly, and particularly limited to situations where it does not appear that private remedies are feasible. This, of course, is our policy statement, but a policy statement is not binding on subsequent members of the Federal Trade Commission or the Department of Justice, for that matter.

So, I think some encouragement from this body, would be a very salutary thing for you to do.

I just wanted to add something to what Steve Calkins had to say on the whole subject of penalties and what the rest of the world is doing. It is true

that the rest of the world relies a great deal more on government penalties than we do in the United States, but the rest of the world does not have the expansive private treble damage regime that we have in the United States either. They have made a choice up to now to go more the government route. But I don't think that their experience is necessarily pertinent to where we are.

And just one other comment I would like to make, on the doctors. I think it is disappointing. I think it is disappointing. There was a period of time when we were more optimistic than we are today that they were getting the message, and they don't seem to be.

On the other hand, as a practical matter, you have to ask yourself whether the government should be riding to the aid of substantial payors who, if they have been overcharged by these doctors, surely can take care of themselves. If they don't choose to sue because they feel that perhaps in subsequent negotiations with these groups they are going to get better treatment, I think that may be a rational economic decision for them to make.

So it is not necessarily a good case for the government to act as champions of little people, number one, and secondly, you have to wonder how you would fare in a litigated case in some district court somewhere. By the way, this morning we just announced a unanimous decision involving doctors' price fixing in the North Texas cases. I think that to go into a court in North Texas and try to recover some money from these doctors would be, in the long run, a futile effort.

COMMISSIONER BURCHFIELD: Has the FTC used the 13(b) authority against doctors? I know Mr. Calkins is very concerned about that, about doctors. But I--

COMMISSIONER LEARY: No, sir. I understand the point, and I am disappointed myself about the level of compliance in the medical community, but I think there are a lot of serious practical impediments to going out there and trying to apply 13(b) to get monetary relief against a bunch of doctors.

COMMISSIONER BURCHFIELD: Professor Calkins.

MR. CALKINS: Commissioner Burchfield: Mr.

Arquit and I were sitting here--and indeed, there is one doctor case, a Puerto Rico case, where 13(b) was used to get I think $300,000 in restitution by consent. That is my recollection.

COMMISSIONER BURCHFIELD: That's right.

Do you foresee a broader use of 13(b) in that area? You do, based on your statement. Does anyone else? Commissioner Leary? Do you see a broader use of 13(b) against doctors? I take it you don't.

COMMISSIONER LEARY: I don't see it on the horizon, to be quite candid with you. I am going to be gone by the end of the month, and so I obviously can't talk about what other people are likely to do. But there are practical problems with doing it.

COMMISSIONER BURCHFIELD: Mr. Graubert, do you have a view on that?

MR. CALKINS: Can I just correct a misimpression? My concern with doctors is simply that they are an example of what I see as this middle category of cases where we have insufficient deterrence; where we don't have private lawsuits providing the stick, if you will; where we have a

problem because the system is not working.

Whether or not a particular case would be a good one for 13(b) would depend upon the facts of the case, and you would have to work through whether there was money to disgorge, and a variety of things. Whether or not doctor cases are a good use of 13(b) or whether or not they are an argument for coming up with a civil fine remedy--or whether it's just a problem we can't solve--I haven't answered that question. I have just said it is an example of the kind of problem that I am talking about.

COMMISSIONER BURCHFIELD: Mr. Graubert, I think you were going to say something.

MR. GRAUBERT: That's correct. I was just going to add that I think that Chairman Majoras has recently addressed this question in one of her speeches, and I apologize; I can't remember which one, but I will find it for you.

COMMISSIONER BURCHFIELD: All right. Thank you.

MR. GRAUBERT: But it may be on our website as well, but I will find that speech and send it to you. And it is possible also that Chairman Muris

also had some remarks on this subject, so I will try to find those for you.

COMMISSIONER BURCHFIELD: Mr. Arquit.

MR. ARQUIT: Just a brief comment. It would certainly be ironic if the Commission moved in this direction. For those of you who have practiced antitrust for a while, you may recall that the--I think by far the harshest criticism of the Reagan antitrust enforcers was that they went after the little fish and let the big fish go. And the claims were that the Commission and the DOJ were focused on doctors in the upper peninsula of Michigan while they were letting corporate America get away with all kinds of issues.

So, given that criticism and the move since then to I think have a broader based agenda, I think it would certainly be ironic to now see the agency circle back in the name of disgorgement or other civil penalties in the physician field.

COMMISSIONER BURCHFIELD: Madam Chairman, my time has expired, but I want to thank all the panelists today for some very thought-provoking statements and for some useful dialogue with us and

among yourselves.

CHAIRPERSON GARZA: Thank you. Commissioner Valentine.

COMMISSIONER VALENTINE: Thank you. I don't have the time to be nice because, unlike Mr. Burchfield, I only have five minutes. So I will thank you all in brief, and move on to questions.

I do not find the 13(b) issue very interesting, because I do believe very strongly that the plain language of the statute, which talks about neither consumer protection nor competition cases, makes it very clear that injunctive relief is available in all types of cases that the Commission brings pursuant to 13(b), and I believe, very much like Mr. Calkins, that precisely because it is not just the FTC, but the FDA, the SEC--a plethora of federal agencies rely on the grant of equitable power to obtain ancillary equitable relief, whether that be in the form of asset freezes, disgorgement, or restitution or injunctions means that this really is best left for the Supreme Court to resolve, and I don't think there has been any great dissension in the courts thus far.

So I would like to focus my comments on the civil fine aspect of this and some of Mr. Leary's statements about PI proceedings, which I wish we had had the benefit of a week or two ago, but that's okay.

First, I would like each of you to address whether you think it would be preferable for the FTC and DOJ to also have civil fine authority, or whether you think it would be more preferable to simply encourage DOJ to make use of its ability pursuant to again the broad equitable power granted to it to seek ancillary equitable relief, assuming of course, that the Supreme Court in the *Philip Morris* case comes out as the DOJ seems to want it to.

Second, Commissioner Leary, I would like you also to address, since you have taken the brave step of confessing that there should not be a need for the FTC and DOJ to be at least perceived as proceeding pursuant to differential PI standards, what would be the best way to accomplish uniform PI standards between the two agencies? Should we recommend a task force? Should they agree on some harmonization of how they write briefs in going into court and seeking

a PI? And would you also be averse, assuming that we actually think that both agencies should be subject to the same standard--excuse me for having such compound questions--would you be averse to having us recommend that, in fact, the FTC always has to choose to go into court, it doesn't get the option to choose because we really do want the two agencies to proceed as identically as possible in all merger cases? However, we would have no problem with the FTC being able to make use of its administrative adjudication in consummated mergers and mergers that were not subject to HSR filing?

And finally, Mr. Arquit, I would ask you, and I would like you to not rely on the *Mylan* case in which you obviously represented the defense counsel--one 13(b) competition case in which you do think that the FTC achieved beyond treble damages in terms of redundant and duplicative relief. And I hope you don't name your own *Abbott Labs* case that you brought.

Okay, why don't we start at Commissioner Leary's end, since you have the most questions to answer, and then I will take an answer on the civil

remedies from the two middle folks, and Mr. Arquit on civil remedies versus DOJ equitable relief versus example of true abuse of 13(b).

COMMISSIONER LEARY: Well, let me start with this, Commissioner Valentine. Let me start with the preliminary injunction standards. I am not so sure that the Commission really needs to do anything too affirmative if the FTC were to unilaterally announce that it would exercise the option up front to either proceed in federal court or to proceed administratively.

That would remove the rationale. If you look at some of these cases--and I think a lot of this stuff frankly is dancing on the head of a pin--but if you look at the rationale the courts have applied to justify a different standard, it is that we need to preserve the *status quo* for the subsequent administrative proceeding. If it is made abundantly clear up front what is actually the fact today--

COMMISSIONER VALENTINE: Correct.

COMMISSIONER LEARY: --that the Federal Trade Commission is not going to bring a subsequent administrative proceeding, that may automatically

take care of it. I personally have urged that people internally never make an argument to a court that we should apply a different preliminary injunction standard once we roll out an administrative proceeding.

The problem you have, by the way, if you routinely vote out administrative proceedings to protect or to preserve an option that in fact you don't exercise, is that then the Commissioners tend to be distant thereafter. As you know--you were there-- we can theoretically intervene in the prosecution of the federal court action, but as a practical matter we feel very awkward doing so when we are possibly going to act as judges in Part III. So, we don't have the same control over the arguments the staff make that would be desirable.

I think we can take care of that.

You have asked an intriguing other question, which is why should there be the authority up front? Even though we can have administrative authority for a consummated merger, do we really need it for a merger that hasn't been implemented in the first place?

I would suggest to you there is really no difference. Take the *Arch Coal* case, where I dissented from bringing the preliminary injunction action but voted for the administrative complaint, because I thought that was a case that was very well suited to the more leisurely pace of an administrative action. I was willing to let the parties close--and if we bring an administrative action alone before the merger, the parties are very likely to close--and then we are in the same position that we would be in, anyway.

So I don't see the big difference between the two.

COMMISSIONER VALENTINE: Well, parties before the DOJ would not be exposed to that leisurely pace. If Kevin's merger parties went before the DOJ, even if they didn't have assets like--even if they did have assets like coal that wouldn't be scrambled--

COMMISSIONER LEARY: Yes.

COMMISSIONER VALENTINE: --if the DOJ can't say, "Wait, we're going to go leisurely in administrative proceedings," why should it be subject

to administration?

COMMISSIONER LEARY: Because I think if you want to revisit that, then I am afraid what you have to do is revisit the whole underlying theory of having a Federal Trade Commission in the first place. The reason for having a Federal Trade Commission in the first place was that you would have the possibility for prayerful consideration of some of these more difficult and challenging issues in one agency, rather than relying on federal district judges here, there, and everywhere. Unless you are willing to revisit that basic issue, it seems to me there is no particular logic in saying you can't bring an administrative action before the parties have closed, but if they close tomorrow, you can bring an administrative action. I don't see any sense in that.

I really do believe that the Federal Trade Commission has a practical contribution to make to in the development of the law. Let me just give you an example. I think that the Commission opinion in the *Polygram* case, which was upheld in the circuit court of appeals, was an effort to make sense out of the

hazy difference between *per se* cases and rule of reason cases after *Cal. Dental*. By the way, this case that I just told you that came out this morning follows the *Polygram* analysis and attempts to further that analysis.

That, I think, is a significant contribution to the law that benefits everybody, and that is something that is somewhat more difficult for a random assortment of federal district judges to do for you.

COMMISSIONER VALENTINE: Thank you, Tom.

COMMISSIONER LEARY: Okay. Have I answered your questions? I don't know.

COMMISSIONER VALENTINE: Well, do you want to say anything about civil remedies versus DOJ equitable relief or civil remedies?

COMMISSIONER LEARY: Well, at the moment, when we want to get civil penalties for order violations and so on, I don't even have it in my mind when we have to ask the Department of Justice to get the civil penalty for us, or whether we can do it on our own. You know more about that than I do.

My initial reaction was that this is kind of

a goofy, ponderous procedure, but before I came up, I talked to staff about it: "Do you have any trouble dealing with the DOJ on these issues?" and the answer I got was, "No, we've got a fine relationship with them, and we don't recommend that anybody try to tinker with it at the moment." So that's just my nonrandom sample of one.

MR. GRAUBERT: If I could ask the Commission's indulgence just for a second, I just want to take the opportunity--this might be a premature testimonial, but if Commissioner Leary is correct that he is going to be leaving in a few weeks, I did want to make sure that I expressed publicly my great pleasure and it has been an honor to be associated with Commissioner Leary, and we have had these discussions over the last seven years, and I have enjoyed them very much, and I think it has been a benefit to the Commission's development of policy.

I would, however, refer the Commission to my boss's testimony, Mr. Blumenthal's testimony from a few weeks ago, and I have nothing to add to that on the question of merger standards.

On the civil fines issues as well, I have to sort of duck that, I have no instructions from my client on that question, and you will see from footnote number two in my paper, that, as to competition cases, the Commission has not taken a position.

We have, on very discrete occasions, gone to Congress and said, "Here are some particular consumer protection areas where we think a civil fine might be helpful," and I think those matters are still pending.

But I would certainly echo what Commissioner Leary also said, that I am certainly grateful for the cooperation that we have gotten and the support we have gotten from the Department of Justice on our civil fine cases to date.

But I am afraid I have nothing further to add to that.

COMMISSIONER VALENTINE: Thanks for nothing.

Mr. Calkins.

MR. CALKINS: In the academy, the right wing, if you will, regularly makes fun of the left wing for always thinking about rights and always

claiming to find rights. Indeed, we had a job talk yesterday from somebody whose paper sets out energetically her view of the rights of the dead and the importance of the law recognizing that dead people have rights, too.

And, occasionally, folks on the more conservative wing step back and say, "You know, God and the Constitution didn't hand everybody a right about everything, and when you start off thinking about rights, you're often going to get confused."

I can't begin without saying that's what came to mind as I heard Commissioner Leary talking about the new claim of defendants that there is a right to be treated in exactly the same way by whichever agency happens to be the one that's investigating you. I don't see anywhere that anything gives anybody a right to have a trial in front of a district court judge if they have some kind of conscious parallelism case--as opposed to a trial in front of an administrative law judge.

You know, the reality is that Congress, in its wisdom, passed two different statutes and set up two different ways of proceeding, and sometimes it

happens that you are going to have a trial before an administrative law judge, and sometimes it happens that you are going to have a trial before a district judge; and sometimes the lawyers against you will be better, and sometimes they will be worse; sometimes the law judge or the district judge will be better or worse; and you know, if you think it's unfair, well, life isn't always perfectly fair. Grow up, get a grip, and move on.

So on this whole basic idea that if ever anybody has somewhat different treatment than someone else, that that is somehow a violation of his or her rights--I just am not persuaded with respect to the general spectrum of antitrust enforcement.

With respect to this claim of the terrible unfairness of a different preliminary injunction standard, I defy anybody to name any case that came out differently because of the wording of the standard. I think everybody who has been a lawyer knows you use the words that you have to the best of your ability, but in the end either it's a good case or it's a bad case, and the precise phrasing of the standard is simply not going to change things.

Indeed, I have written about summary judgment periodically, and my impression of summary judgment cases is that, if the opinion says summary judgment should almost never be granted, only extremely rarely in the very unusual case--well, you know that summary judgment is going to be granted when you get down to the meat of the opinion. Because you just take the standard and put the wording down, and that's not really what matters.

So I just don't see that there is any need for Congress to change the standards on preliminary injunctions, because I just don't see that it's affecting any outcomes. There are so many important issues for you to address that you ought to work on the ones that are important and not this one, which is unimportant.

CHAIRPERSON GARZA: I am going to need to interject. In order to stay on track and get us out of here by noon with the number of Commissioners left, I think we can extend the Commissioners' time for 10 minutes apiece as long as we agree to strictly observe the red light. I think in this case we went well over 10 minutes, so if I could say I would like

to move on to the next Commissioner. If any Commissioners want to cede any of their time to let Mr. Arquit answer Debra's question, then you may do so.

But for now, I think can we move to Mr. Litvack. Commissioner Litvack, please.

COMMISSIONER LITVACK: Thank you, and thank you all.

Let me ask Professor Calkins--you suggest the possibility that the FTC perhaps should be given the ability to impose civil fines. Would you add that, assuming there is in fact a right to disgorgement in antitrust cases under 13(b)--just assume that for a moment--would you add that remedy, or if you had the disgorgement clear, you forget the fine, or if you have the fine, you don't need disgorgement, or do you like them both, just pile them on?

MR. CALKINS: My personal preference would be that, if there were a new fining power on the part of either agency, that it be done in a way that would coordinate with private remedies. It seems to me that the thing to do is to figure out the right

amount of deterrence and then let that happen. And so my preference would be, if there was a fine, that it be written in a way that it would be either suspended or put in escrow or something so that we could wait and see how much money was being paid out in private damages and then coordinate it with that.

Because of that, I would think that there is no particular reason to have both a fine and disgorgement in any specific case. If we are going to have a whole new system of fines, the thing to do would be to figure out the right amount of fine and let it go, at which point there would be no need to be going off and getting disgorgement at least in terms of deterrence, which is the most important thing to think about.

COMMISSIONER LITVACK: I guess a question I have, just very briefly to follow up on that, is, why are you concerned, why should we be concerned, why is Mr. Arquit so concerned, about the private treble damage in the following scenario: The civil fine, as I get it, civil fines are akin to a criminal fine. It's not a criminal proceeding, but it's a penalty. They pay whatever penalty they pay. The damages that

a private litigant, if any, has suffered and proved are irrelevant to that, aren't they?

MR. CALKINS: It depends. Certainly in terms of fines, today, they are irrelevant. If you have a criminal fine for price fixing, the money goes to the government, and it's got no connection to damages at all.

On the other hand, if you are asking whether in a perfect system we would be interested in having the proper amount of deterrence, I think that we would and we should be--and where you have lots of money being paid out in damages, there is less need from a societal point of view that there be money paid out in fines. And so I think it makes sense to try to coordinate them.

COMMISSIONER LITVACK: Commissioner Leary, in recognizing that you are going to be or may be leaving at the end of the month--I could personally add--I hope you're not, but that's neither here nor there--and recognizing it's not a Commission position, but just your own--would a fine system be a preferable alternative to, in your judgment, the disgorgement, assuming for a moment disgorgement

exists?

COMMISSIONER LEARY: You know, I can't answer that, because I think for deterrence, obviously maximum deterrence involves penalties against individuals, and that is why I think the deterrent remedy of criminal law and jail time, whether it's antitrust or other white-collar crimes, is pretty staggering.

The problem I have with civil fines against entities other than the individuals is that the fines often punish the wrong people. My experience in the corporate world is that a fine against a massive corporation does not necessarily deter misconduct by people who work for that corporation. Disgorgement is a little bit different, because what you are saying is: "You, the shareholders of XYZ Company, at least we are not going to allow you to benefit from this illegal conduct." Therefore, it seems to me disgorgement is more targeted if we are going to apply it against the entity. What does it mean to punish Exxon?

COMMISSIONER LITVACK: With that rationale, a criminal fine is irrelevant, too.

COMMISSIONER LEARY: The criminal fine against a corporation, measured by twice the damages is a fairly draconian remedy, but all I am saying is that I would really hate to see the Federal Trade Commission--

COMMISSIONER LITVACK: I agree.

COMMISSIONER LEARY: --get into it. I'm not talking about the Department of Justice, but I would really hate to see the Federal Trade Commission get in the business of levying civil fines the way the DOJ has the power to do, criminally.

COMMISSIONER LITVACK: Yeah, I agree, and that leads to my next question, which is Mr. Arquit--and remember, at least in my question, DOJ doesn't have power to levy fines and shouldn't have power to levy fines. All they would have is the power to seek--

COMMISSIONER LEARY: To seek fines, of course, from a judge.

COMMISSIONER LITVACK: So, Mr. Arquit, why shouldn't they have that power? You have the criminal--I mean, Professor Calkins points it out--you have the criminal remedy, and all that it brings.

You have the civil remedy, which basically is injunctive relief insofar as the Department of Justice is concerned. You point out that they have gone beyond in some cases, and yeah, that's probably true. But why shouldn't they have the power, the discretion to proceed, and remembering that it ultimately ends up before a court, to proceed civilly, yet seek, in effect, a penalty, a levy of some sort? Why not?

MR. ARQUIT: Are you referring now to the Justice Department, the FTC, or both?

COMMISSIONER LITVACK: Yes, Justice. Strictly Justice.

MR. ARQUIT: Just the Justice Department.

COMMISSIONER LITVACK: Correct.

MR. ARQUIT: Well, I think that we have been talking here about deterrence and that these additional remedies would go to that, and I think the Commission, anyway, has been very clear that when it embarks on disgorgement or restitution, that's not intended to deter, it is not a penalty. It is a way to deprive a wrongdoer of ill-gotten gains, and that's why they made clear that if they had the

ability to impose penalties, they wouldn't allow any kind of offset.

So I think that applying that--and that seems to--I think, you know, assuming that the DOJ would take the same point of view, when you are talking about civil penalties, you would be talking about something that is really intended to be exemplary in nature, punitive in nature, as such. And that goes to whether or not you feel that the system right now works.

If you think that the--see, from my perspective, I think that these orders, they are broad orders, and they follow on civil litigation, provide sufficient deterrence that there is not a need to expand it at all.

I would agree with you that, if someone came to the conclusion that we were not about deterrence, and we weren't worried about too many false positives, that a very rational way to do that would be to add civil penalties to the Justice Department.

I do think then you get into the amount, of course, and the $11,000 a day that results right now in Hart-Scott, many people make the argument that

companies sometimes just view that as almost a licensing fee, because the money they can make by avoiding it is so much greater than the fine that it's not a meaningful deterrent.

COMMISSIONER LITVACK: Let me ask you what is the last question. You may be able, in answering mine, to answer Commissioner Valentine's as well.

It is the following--and you recognize that you are the Lone Ranger on this point--but having spent time, as I have spent some time, here in Washington, and having spent time in New York and elsewhere, as we both have, I am surprised, I must tell you, at your suggestion that you would prefer to have Congress deal with the issue of 13(b) than wait for, where I look for hope eternally, which is in the courts of appeals. Why wouldn't you want to get a clear answer, unless you think you have one, and if you think you do from the D.C. Circuit, then what's your problem? If you don't think you have one, then why wouldn't you wait for a clear answer before, at a minimum, going to Congress to seek legislation, which is the normal way?

So I am just perplexed as a practitioner

kind of why you are favoring something that would be my last resort.

MR. ARQUIT: Well, maybe I've been away from Washington enough that I'm not quite as cynical of the Congress as those that are here every day. But a couple of things:

First of all, a lot of the law the Commission and the Justice Department make is not law by judges: it's law by settlement, because frankly, the down side of proceeding forward is such that most times people just settle the cases. And indeed the disgorgement cases ultimately ended in settlements. So the longer this hangs out there, uncertain, the more the government *de facto* has the ability to impose these, what may be unauthorized, amounts on people.

So I think the quicker the better.

Secondly, I really do think that in the consumer protection area the Commission's mission has been spectacular and filled a gap that was intended, and because of this parallel nature of this forward-looking versus backward-looking, I really think that, just like the Commission used the hard-core cases to

get its authority in the first place, if it stretches in a Rule-of-Reason case to get the authority, of course, it's not going be as sympathetic to it. If you throw it out on the one, it really does possibly jeopardize the other mission.

And I think only the Congress can deal with that.

And then finally, just so there is no misunderstanding about my testimony, and because John opened the door, I am very sorry Commissioner Leary is leaving the Commission. I have to tell you that-- no, this is not the time or place for it, but I think it's appropriate, given how I started out is that, you know, I can't remember having as stimulating or as intellectual discussions as we would have in his office, and I can say uniformly that, even when we lost on things, that there was no client we ever went in with who didn't feel he or she got due process, because he knew the case better than any of us did when we went in there.

COMMISSIONER LITVACK: Well, my time is up. I want to thank you all and only add that my intellectual conversations with Commissioner Leary

were limited to his coming into my office when I was at the Antitrust Division, and he was at General Motors trying to inform me intellectually why everything we did was wrong.

(Laughter.)

CHAIRPERSON GARZA: Thank you. Commissioner Jacobson.

COMMISSIONER JACOBSON: Thanks. I also want to commend Commissioner Leary for six marvelous years of public service, and I am sorry he is leaving, but certainly, we have two good appointments waiting for confirmation that I think will maintain the level of quality of the Commission in a good way. But thank you for your excellent service.

I just have a couple of questions for Professor Calkins. Is the fine authority that you are suggesting for the Justice Department purely a civil fine authority? There would be no change in the criminal regime?

MR. CALKINS: There's no reason to have a statutory change in the criminal regime. I assume that if you had civil fines, you might find Justice, on a few cases on the margin, going with a civil fine

instead of trying to go criminally, and so it might have a difference in terms of what cases are brought. But it wouldn't change the statutory authority.

COMMISSIONER JACOBSON: On disgorgement, Mr. Arquit, what examples would you use as your sort of keynote examples of instances where the Commission in competition cases has overreached or abused its authority?

I mean let's assume there is a statutory basis for it. Would it be your position that any of the cases heretofore have been an abuse of that authority?

MR. ARQUIT: Well, I was involved in the *Abbott*, *Mylan*, and *Hearst* cases, and I just don't think it is appropriate for me to comment on any case that I was involved in, because someone is going to get upset no matter how I answer it.

But I think, more generally, if the Commission has the authority, then it has the right to use it the same way it does as to others. I don't view it as abuse if one is using authority that one has been given. But to the extent that there has been abuse, I would say it is this: it is that, when

these funds have been collected, the Commission has made a big point out of the fact that some of the funds are going to go to those who otherwise could not recover under the antitrust laws, that is, indirect purchasers. Some of the amounts that have gone into these funds have gone to them.

And to me, what that is really saying is the Commission sees it as gap-filling. From my perspective what the Commission is doing is arrogating unto itself the right to decide what the antitrust laws are, because the Supreme Court has decided that the scope of the antitrust laws is limited by *Illinois Brick*; it's limited by antitrust injury. Statutes of limitations are put into place for a reason, and that those who fall outside of those parameters don't recover.

And for the Commission to come in, an unelected group, and essentially overtake the role of the Congress and the courts by filling in what they call gaps is, to me, them taking the position that they define what the antitrust laws are.

COMMISSIONER JACOBSON: You would agree, wouldn't you, that, just in terms of the statutory

text of 13(b) in terms of the disgorgement, permanent injunction authority, there is no difference between consumer protection cases and competition cases? This is in the actual text of the statute as opposed to the history.

MR. ARQUIT: It's a question that has premises that I don't accept. This language says nothing about either. It says, provided, however, in a proper case the Commission may seek a permanent injunction.

COMMISSIONER JACOBSON: All right, but you support the authority to seek injunctions in terms of disgorgement and consumer protection cases, unless I misheard you over the last few minutes.

MR. ARQUIT: Yes, I do, as a matter of public policy, but there I go back to what Commissioner Leary said earlier, which is that, if one went back to Congress today, one would pretty clearly be able to get that authority on the consumer protection side. And maybe because I believe in that, more as a matter of public policy, this may be what motivates people at the Commission on the competition side, that you are willing to take what

may be a thin legal basis and hope that the courts make good law out of it.

I certainly think it would be devastating if the Commission were to lose this authority on the consumer protection side.

COMMISSIONER JACOBSON: But granting that, the words of the statute clearly don't make any distinction--assuming they give any authority to the Commission to seek disgorgement, they don't make any distinction whatsoever between consumer protection and competition.

MR. ARQUIT: Well, that's where the legislative history comes in, and the proper case, that whole provision was taken completely intact from the Magnusson-Moss Warranty Act, which was purely a consumer protection statute, and the only thing that was changed in that statute when it was pulled out and put in the pipeline bill was the first part of 13(b), 13(b)(1), which talks about when you can get a preliminary injunction. And so, yes, indeed, the congressional history shows that that second proviso was intended to apply just to consumer protection cases.

There is no question about what a consumer protection case is, a proper case under the final provision of 13(b).

COMMISSIONER JACOBSON: I have no further questions. I would like to give Mr. Graubert time to respond if he would choose to do so.

MR. GRAUBERT: Thank you, Commissioner. I did just want to clarify or respond to one part of Mr. Arquit's responses. I would not accept his characterization of what the Commission's policy generally is with respect to--I think he called it gap-filling or suggested that it was our intent to undermine the antitrust laws as they have been articulated by the Supreme Court.

That is not an accurate description of either our policy or our actions. I am just bringing to mind the *Mylan* case, and actually, this is sort of an example of how it has turned out, and I'm not sure that I have a scientific explanation for this, but we actually have had more efficient results in those recent cases, because we have facilitated, in a way, global settlements of all the claims that had been asserted.

Now in *Mylan*, claims were asserted by the states, and I can't remember all the other claims. So everyone that had shown up with a claim under some statute was ultimately--except the people who opted out and then went to trial--was included in the settlement.

So it was not our intent to go out and find people who had been specifically told, "You can't recover," and give them money. That is not what happened. We in fact facilitated a resolution of all the claims that had been asserted at that point, which reminds me also of another little clarification I wanted to make, which is that--and I'm not sure how this cuts, either, but I have some difficulty sort of imagining the scenario that Mr. Arquit is advocating with respect to government actions and then follow-on suits. But with--I think that his scenario is going to encourage more litigation and not less.

But I did want to clarify that, as far as I can recall, and I haven't looked at this in many years, the Clayton Act's collateral estoppel provisions do not apply to FTC actions. So that's not going to work for the FTC.

That's all I have.

MR. ARQUIT: Well, I know I'm speaking out of turn, but I would commend to Mr. Graubert the commission's 2003 Policy Statement on Monetary Equitable Remedies in Competition Cases, because the entire purpose of the value added by the Commission's monetary remedies is to take into account where private actions likely will not remove the total enrichment for a violation. And it goes on to talk about where statute of limitations is, and the very examples I gave were mentioned.

MR. GRAUBERT: Yes, but--and I don't mean to take up all of your time, Commissioner, but the purpose of that is to take money away from the wrongdoer, if it is not going to be taken away by anybody else, not necessarily then to give it to people who are not entitled to it.

COMMISSIONER JACOBSON: I yield.

CHAIRPERSON GARZA: Okay. Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. Well, hearing that Tom Leary is going to be leaving the Commission is really occupying my mind more than 13(b) right

now. I think we have covered 13(b).

You know, what people may not remember is that, at every chapter of his stellar career, he has just made a difference. We have talked about going up to Congress or not going up to Congress today. I don't know if all of you--any of you know that there would probably be a statute on the books codifying *Dr. Miles* if Tom Leary didn't calm a very impatient Congress a number of years ago.

There would probably be a statute on the books clarifying potential competition if Tom Leary hadn't asked for restraint in trying to think that through.

So I just wanted to pay tribute to you, Commissioner Leary, in your previous chapters as well, because I think you have contributed all along the way.

Putting aside the legislative history, which is a little convoluted, there is a little more thickness to it than I think we will hear about in McCarran-Ferguson, which has an even slimmer and less clear legislative history than this provision of 13(b), and the case law, which I think we all need to

watch as it evolves.

But, Kevin--and it's good to see you, too. I wanted to ask you, what is your public policy thought about the policy expression in 2003? I mean, if we put aside the legislative history debate and the case-law development, I mean, is that a reasonable approach, apart from the providence of whether it should even be talked about?

MR. ARQUIT: Well, it certainly is more extensive than anything the Commission has said before, and in that sense, it is certainly a positive development, and it tries to set out a methodology, and it certainly does much better than bureau directors, probably including myself and some other commissioners, in terms of using the kind of overarching language that existed.

But when you look at the three tests, these guidelines fail for the same reason many guidelines fail. The government has to be overly timid, if you will, in terms of describing the circumstances under which they will take action, because if they create safe harbors, there is always going to be a case that falls--always--there will usually be at some point in

time a case that falls outside the safe harbor that they want to be able to bring, and they don't want the guidelines thrown back in their face saying, "Hey, you told us this was okay."

You see it in health-care guidelines, and I think you see it in this. I mean, you look at the three tests. One is, is the violation clear? Secondly, is the injunction calculable? And third, does it bring value-added?

How does that really pin down for you the type of case you're going to bring?

In fact, the first two elements, if those are established, those are the primary kinds of cases that are brought by the private sector.

So in a sense it defines the Commission to bring cases to where they may be least needed if you buy into the public policy notion that they are really trying to protect--and I don't use the word "gaps", but that they are trying to fill in where the private actions don't take hold.

COMMISSIONER YAROWSKY: I have a question unrelated to this subject, but I think this is a terrific panel to at least ask for your views. This

will relate probably more to the general subject of the afternoon hearings than this particular subject matter, but I think we have a great panel.

What are your feelings, personal feelings, if you can express them, about the prohibition that is laid on the FTC's shoulders about pursuing non-profits?

MR. ARQUIT: Who do you want to go first?

COMMISSIONER YAROWSKY: I'm not sure we are going to have witnesses who will address this afternoon, during which the subject is immunities and exemptions. I would love to hear your opinions about it.

MR. ARQUIT: I think that it is an exemption, like most exemptions, that should be done away with immediately. The fact is that not-for-profits in many sectors compete with the for-profits. The not-for-profits, when they are entitled to exemptions, encourage inefficiencies, the same way you find inefficiencies in regulated industries. Any time you protect any group from competition, you are going to find those types of situations existing. And it is an unfair advantage to them over the for-

profits to give them these breaks, and ultimately, I think it makes them less efficient because they don't have to play in the same marketplace that others do.

COMMISSIONER YAROWSKY: Steve.

MR. CALKINS: A marvelous answer that I endorse in its entirety, except that he should have added one other point, which is that of all of the Commission activities that are unproductive, you would have to rank high on the list the deliberations about whether or not this or that respondent is entitled to that exemption, because those have been among the least productive uses of Commission and other public resources.

So it is an exemption that has no justification, that has bad consequences in terms of its effect, and which has caused complexity and a real waste of administrative and judicial resources.

MR. GRAUBERT: I would prefer, if you would let me, to pass on that question.

(Laughter.)

COMMISSIONER LEARY: I agree with both of my colleagues, and while you are looking at anomalies that don't make any sense, you might want to also

consider whether it makes any sense to have Hart-Scott-Rodino limited to corporations. All of the rule-making and learning and baloney that you have to go through distinguishing between the myriad forms that are between a corporation and a partnership make no sense at all.

COMMISSIONER YAROWSKY: I am going to yield unless--Debra, did you get full satisfaction with the panoply of questions you asked, or--

COMMISSIONER VALENTINE: Well, I don't mean to--why don't we let others.

COMMISSIONER YAROWSKY: All right.

COMMISSIONER VALENTINE: And then if there is time, we can--

CHAIRPERSON GARZA: Okay. Steve, you have noted that current FTC policy and practice concerning the use of 13(b) in the antitrust area has been quite limited. Yet the AAI, for example, has urged in the past that the FTC should seek disgorgement as a supplemental remedy, and as often as possible.

If you were made chair of the Federal Trade Commission in the future, which I guess is not beyond the realm of possibility, what policy would you

propose? And would you follow and implement the existing 2003 policy statement?

MR. CALKINS: I think the 2003 policy statement is a good policy statement that responsibly addresses these concerns.

In a lot of antitrust cases, private litigation is going to come along and result in disgorgement of all or most of the ill-gotten gains, and when the system works that way, I see no reason for the Federal Trade Commission to be using public resources to join in.

In the vast majority of cases, there is no need for the Federal Trade Commission to do anything, and the Commission is wise to proceed cautiously, to bring cases only in unusual circumstances, and to be merely a way of stepping in when the system isn't working.

So if the question is, whether I would endorse a call for a sweeping use of this in case after case and such, the answer is no, I would not. I think the 2003 statement is a good statement.

CHAIRPERSON GARZA: You mentioned and then highlighted the third factor of the FTC's policy

statement. Kevin Arquit in his testimony suggested that the third factor should probably be where the analysis starts and ends, and that in fact it may be inconsistent with the first two factors; that is, if you have a clear violation and determinable damages that that's an instance where you are more likely to have private follow-on litigation, and so the third factor is less likely to be significant.

Do you agree with that? And isn't he correct that--about the likelihood of the value add being there where you have got a clear case with determinable damages?

MR. CALKINS: Oh, I think it is correct that some of the time a clear violation will make successful follow-on private litigation more likely. But some of the times that doesn't happen, as suggested in the health care examples I have talked about, and there are times when commercial relationships result in follow-on cases not being filed. And there are times when because of various procedural rules, follow-on cases are unlikely to occur. Will the first factor often mean that follow-on litigation is likely? In lots of cases that is

true, but no one at the Commission is suggesting, and I am not suggesting, that anybody should be filing lots of 13(b) cases.

CHAIRPERSON GARZA: In two recent cases, *Mylan* and *Hearst*, arguably when we look at what happened, the third factor shouldn't have been a significant one. That is, in both of those cases the states and private parties sued.

Are you aware of any evidence there that disgorgement did add value in the sense of the third factor in those cases? Do you know whether the FTC actually considered the likelihood of private action before it decided to seek or accept disgorgement? And, assuming it did, do you agree that it erred in its prediction about the likelihood of private action, and if so, what caused the error?

MR. CALKINS: Very good questions. Mel Orlans spoke to two cases, *Mylan* and *Hearst*, and I have had conversations about *Perrigo*, and Commissioners have issued statements--and my understanding is that in deciding whether to use 13(b) in *Mylan* and *Hearst* and *Perrigo*, the FTC gave specific consideration to the likelihood that

disgorgement would be successful without Commission action.

Now, as you point out, some private lawsuits were filed. The thing that makes it difficult to sit back and evaluate whether those were good 13(b) cases or not is that, once the Commission has filed a case saying it is proceeding under 13(b) to request disgorgement of a pot of money--which everybody knows will be used to give to injured individuals and corporations--it would be an unusual plaintiff's lawyer who would not say, "Golly, maybe I should volunteer to represent some of the people who would benefit from that disgorgement."

And so the fact that the FTC's, proceeding under 13(b) leads to private lawsuits does not in any way prove that those private lawsuits would have been filed had the FTC, for instance, filed an administrative case.

In the case of a merger case (if you look at *Hearst*) well, there is a merger case that the FTC brought administratively against *Evanston*. Although it is hard to prove that there is no private follow-on litigation, I have heard of no treble-damage suits

being filed saying, "The FTC has an administrative challenge against a merger, and so we are rushing in to get treble damages." I haven't seen that.

Commission representatives have said that when they thought about *Hearst*, they thought that the alternative was an administrative challenge to a merger and a Hart-Scott enforcement action that doesn't have a private right of action, and where we have that fact pattern--you know, an action that private folks can't bring and an administrative action--it seemed to them that it was very unlikely that there would be follow-on litigation, if they went that route.

And the fact that there was follow-on litigation when they went the 13(b) route in no way proves that they made a wrong decision. Maybe they did; maybe they didn't. It's very hard to figure that out. But certainly they thought carefully about it and had, I thought, quite sensible reasons for thinking there would not be the follow-on litigation if they had proceeded with a Part 3 matter.

CHAIRPERSON GARZA: Is there any reason that, in those cases, the Commission couldn't have

gone to court and sought permanent injunctive relief and just simply not sought disgorgement? I mean, is there some reason they would have to do a Part 3 proceeding if they didn't seek disgorgement or restitution?

MR. CALKINS: Well, in general the Commission is in the business of filing Part 3 cases and hearing them, and I think that it is frankly important for the Commission to file cases like that. I think it is good for the antitrust system to have alternative means of cases being adjudicated.

We have had here a love fest for Commissioner Leary, and I want to join in that, but, you know, the Commission attracts people like Commissioner Leary and (we hope to see) Commissioner Rosch and Commissioner Kovacic in part because they think they can make a contribution--in part through Part 3 adjudication.

And so, yes, I suppose the Commission could in a number of cases get out of the business of doing what it was created to do, but then we wouldn't have people of this caliber being part of the Commission, and we would lose part of the richness that has been

a benefit to our antitrust system.

CHAIRPERSON GARZA: But there isn't anything to constrain, if the thought was that you were more likely to encourage follow-on private litigation if you go to court and seek injunction relief, there is nothing to stop the Commission from doing so except for the fact that they may balance it and say we prefer to do a Part 3?

MR. CALKINS: Well, that raises the question whether if they went to court not seeking disgorgement, but just seeking an injunction, would that be enough; in other words, if *Evanston* had been done by going to court and asking for a permanent injunction, would that have triggered the treble-damage actions that we haven't seen? I doubt that it would.

I think that if *Evanston* had been done as a court proceeding against a merger--we just don't see lots of treble-damage actions following mergers. So I don't think it is the mere fact of going to court that stimulates follow-on treble damage actions.

CHAIRPERSON GARZA: Just really quickly, the other thing that you mentioned is disgorgement, and

you raised the idea that perhaps the fact that there is disgorgement actually incentivizes the private bar and private plaintiffs to act, whereas conventionally people have considered that if you get disgorgement, it will be somewhat of a disincentive, because it will reduce the amount of damages they can get, and also would be used to effectively reduce the amount of the attorneys' fees.

But is that potentially a good thing? Is that a reason--that if there is a reduction in incentives, is that a reason that you might want the FTC go in and get disgorgement? In a sense reduce the--

MR. CALKINS: Where the Commission has done--as indeed in the case of *Hearst*--all the work ahead of time and had the whole case worked up and ready to go into court and seek disgorgement--actually it's hard really to be sure what would have happened, but at least there is an argument that the attorneys' fees that were paid out of the settlement were lessened because of that, and it seems to me that when the Commission has done all of the work, as they had in that case, having reduced attorneys' fees is a

benefit to the people who were injured. I would count it as a good thing.

CHAIRPERSON GARZA: Thank you. My time is over, so I will turn it to Commissioner Kempf.

COMMISSIONER KEMPF: Let me begin by jumping on the Leary bandwagon, with particular personal enthusiasm. It has been my great good fortune to have been the beneficiary of Tom Leary's thinking in the antitrust area for just about 40 years now, beginning in the mid 1960s when I was a young associate at Kirkland and he was then with General Motors law department, and I worked with Tom, or perhaps more appropriately for Tom, on many antitrust issues then, and have continued that dialogue while he was in private practice as co-counsel and oftentimes just as a sounding board, and then all of us have benefited from his scholarship during his time at the Commission.

As he has demonstrated today, his mind is as fertile and nimble as ever, and while his days at the Commission may be declining, his time in the antitrust field will continue, and I know that, like others, I look forward to continuing to benefit from

your thinking in the field, Tom.

So thank you both from the public side and from the personal side.

Let me just make one thing--make sure I understand one thing clearly. Kevin at one point said, "Don't recommend any expansion in the area that's the subject today." But I didn't hear anybody else asking for expansion. I thought I heard people saying--oh, I think you, John, said don't--you wouldn't look a gift horse in the mouth--probably you put it a little bit more refined than that--but I didn't hear anybody call for expansion. I think the theme was, "Don't cut anything back, and certainly don't do anything that takes away anything," but did I miss anything, or did anybody call for expansion? No? Okay.

So the issue then is not expansion, it's whether we at the urging of Kevin and others decide to make any recommendations to invite Congress to go in and trim back, for example, 13(b) or to clarify 13(b).

I think I'm--my instincts are with Commissioner Litvack in that I would be afraid of

Congress accepting that invitation, and in the process clarifying things in ways that were decidedly unhelpful.

You drew some very fine and valid distinctions, and I am not so sure they would do it with that scalpel-like surgery and might do a little bit more of a meat-cleaver approach that would be as harmful as it were constructive.

So let me think about that, but that's sort of my instinctive reaction to that.

Let me go to Commissioner Leary for a question.

On page six of your piece, and you talked about this in your oral presentation as well, you commented on the--you say you agree with the ABA's recommendation that the FTC not pursue administrative litigation immediately after the loss of a preliminary injunction motion, and I am curious about that because preliminary injunction motions are not unique to antitrust laws. They existed for hundreds of years before there were antitrust laws. And it is very common for a non-prevailing party who has sought a TRO or PI to then continue on litigation, and the

only reason I would think that there would be some positive traction to yours is that the usual FTC or DOJ merger PI is different from most PIs in the sense it is much more akin to a full trial on the merits. It may last less than a full trial on the merits, but other than that, you know, why should the FTC or anybody be more reluctant than anybody else to seek relief on a full merits hearing rather than on an abbreviated PI hearing?

COMMISSIONER LEARY: I didn't mean to suggest there that the FTC should be treated any differently, say, than the Department of Justice in that regard. In other words, if the Department of Justice loses a PI in a merger case, they can appeal it--and/or they can, if they choose, go forward and try to have a full hearing on the merits before that district judge. I question sometimes whether that option is realistic for reasons that you have just identified.

I am not suggesting for a moment that the FTC should be any more confined in its ability to continue with the litigation, having lost a PI before the district judge, than any other litigant who might

lose.

What I am suggesting is that the FTC, if it chooses to go that route, not have the other weapon in its back pocket that most other litigants don't have, and that is the ability to continue the litigation in its own administrative forum.

COMMISSIONER KEMPF: Let me go to one of your late comments, Tom. That was when you were talking about Hart-Scott-Rodino and eliminating the corporate test. Could you expand on that little bit?

COMMISSIONER LEARY: I simply don't understand why there is any reason to believe that an acquisition by a very substantial corporate entity is any more likely to be anticompetitive than an acquisition by a very substantial partnership or a non-corporate entity, and as you know, there are all these kinds of in-between forms now, between a partnership and a corporation.

I was at one time a member of a law firm that had some attributes of a partnership and some attributes of a corporation, and these things are myriad. We get ourselves involved, I think, in a lot of needless rulemaking and intellectual vaporizing on

whether or not this particular entity looks more like a corporation or looks more like a partnership--all because of an arbitrary distinction that I don't think makes any sense.

COMMISSIONER KEMPF: One thing I would ask you also to comment further on, and that is the--I think you are talking about the standards, the PI standard.

COMMISSIONER LEARY: Yes. Yes.

COMMISSIONER KEMPF: I may have misunderstood you, but I thought you said that you thought that the FTC could fix the--whatever nuanced differences there were without legislation by acting unilaterally.

COMMISSIONER LEARY: Sure.

COMMISSIONER KEMPF: Could you comment on that a bit?

COMMISSIONER LEARY: Yes. If we were to unilaterally announce it, as a matter of policy, and amend the 1995 policy, which said "we will almost never do it," to say "we will never do it," then it would be rather difficult for anybody to argue in court subsequently that the Federal Trade Commission

needs a special PI standard in order to preserve the potential for administrative litigation. We would just the same as the other guys.

So I think it would take care of itself.

COMMISSIONER KEMPF: All right. I am going to yield the rest of my time with a final observation, though. I think it was Professor Calkins who alluded to the rights of the dead at one point in this thing, and being a Chicagoan, I think as one of my fellow Commissioners pointed out to me, we think the importance of the right of the dead to vote is a very sacrosanct one.

(Laughter.)

CHAIRPERSON GARZA: Well, we have all of about four minutes left, and so unless any Commissioner has a burning question to ask, I would like to thank the panelists, and Commissioner Leary, thank you so much in particular for your interest in the work of the Commission, which you expressed early on and consistently, and we look forward to getting your views as we move forward as well as today, and really, that goes to the other panelists as well. We hope you stay involved and interested in the work of

the Commission.

Thank you very much for the thoughtfulness of your written comments as well as for the thoughtfulness of your comments here today with us.

Thank you.

MR. HEIMERT: The Commission will adjourn for lunch. We will resume this afternoon at 1:15 for hearings on immunities.

[Whereupon, at 11:56 a.m., the hearing was concluded.]